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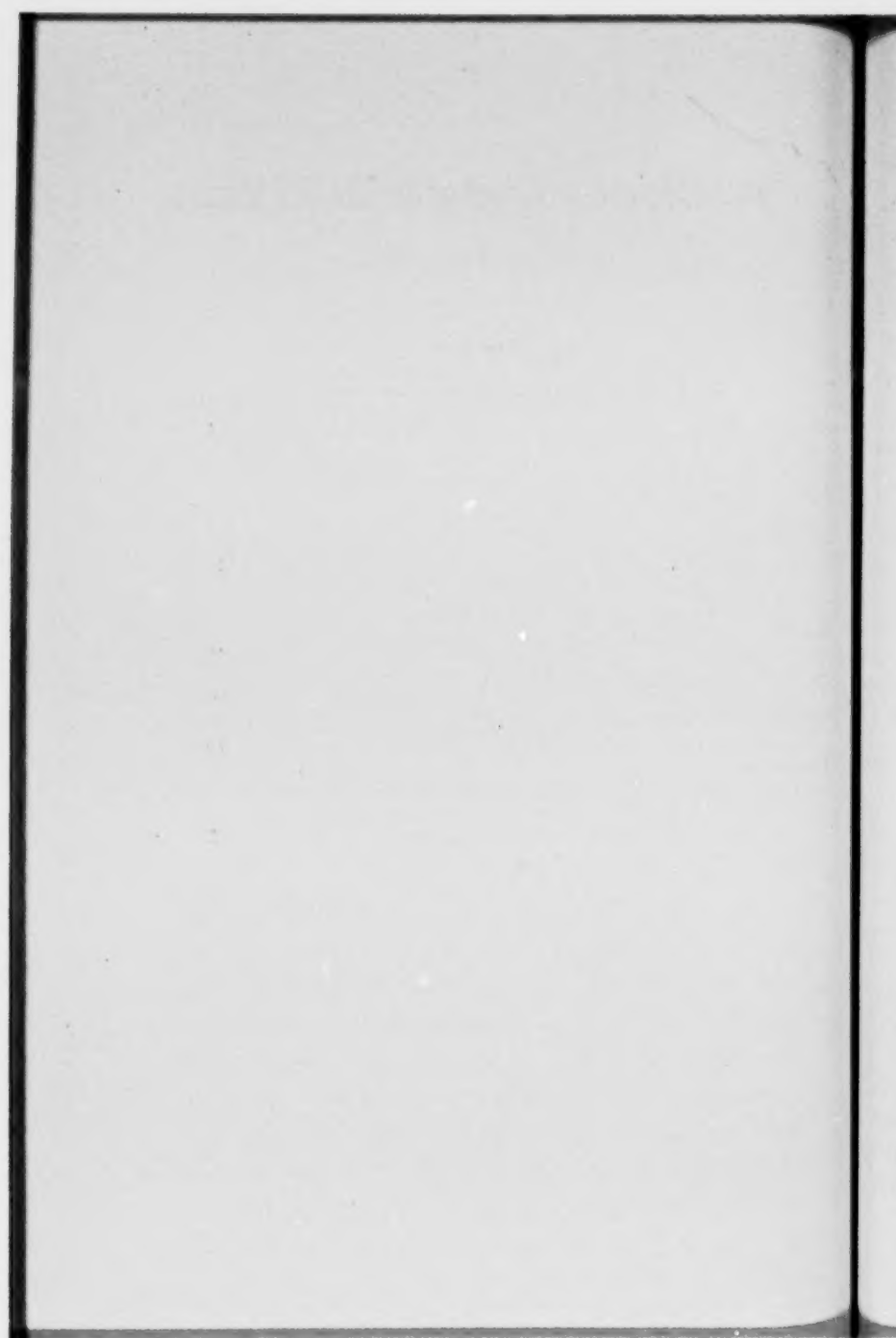
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(I)



In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 134

ROY K. O'KELLEY, ALIAS ROY KELLY, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 29-33) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered April 16, 1945 (R. 34), and a petition for rehearing was denied May 12, 1945 (R. 35). The petition for a writ of certiorari was filed June 18, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Petitioner was arrested when a search of his apartment after an illegal entry resulted in the discovery of marihuana. After his arrest he turned over to officers marihuana kept at another apartment which he occupied. The possession of this second batch of marihuana forms the basis of the count of the indictment on which petitioner stands convicted. The principal question presented is whether the illegality of the original search and arrest rendered inadmissible the evidence subsequently turned over by petitioner to the officers.

STATUTES INVOLVED

The Marihuana Tax Act of August 2, 1937, c. 553, 50 Stat. 554, as reenacted in the Internal Revenue Code, 53 Stat. 279 ff, 26 U. S. C. 2590 ff, provides in pertinent part as follows:

SEC. 2590 (a) There shall be levied, collected, and paid upon all transfers of marihuana which are required by section 2591 to be carried out in pursuance of written order forms, taxes at the following rates:

(1) Upon each transfer to any person who has paid the special tax and registered under sections 3230 and 3231, \$1.00 per ounce of marihuana or fraction thereof.

(2) Upon each transfer to any person who has not paid the special tax and registered under sections 3230 and 3231, \$100 per ounce of marihuana or fraction thereof.

(b) Such tax shall be paid by the transferee at the time of securing each order form and shall be in addition to the price of such form. Such transferee shall be liable for the tax imposed by this section but in the event that the transfer is made in violation of section 2591 without an order form and without payment of the transfer tax imposed by this section, the transferor shall also be liable for such tax.

SEC. 2591 (a) It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 3230 and 3231, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary.

* * * * *

(d) Each such order form sold by a collector shall be prepared by him and shall include an original and two copies, any one of which shall be admissible in evidence as an original. The original and one copy shall be given by the collector to the purchaser thereof. The original shall in turn be given by the purchaser thereof to any person who shall, in pursuance thereof, transfer marihuana to him and shall be preserved by such person for a period of two years so as to be readily accessible for inspection by any officer, agent, or employee mentioned in section 2595. The copy given to the purchaser by the collector shall be retained by the purchaser and preserved

for a period of two years so as to be readily accessible to inspection by any officer, agent, or employee mentioned in section 2595. The second copy shall be preserved in the records of the collector.

SEC. 2593 (a) It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590 (a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590 (a).

SEC. 2596. Any person who is convicted of a violation of any provision of this subchapter or part VI of subchapter A of chapter 27 shall be fined not more than \$2,000 or imprisoned not more than five years, or both, in the discretion of the court.

SEC. 2597. It shall not be necessary to negate any exemptions set forth in this subchapter or part VI of subchapter A of chapter 27 in any complaint, information, indictment, or other writ or proceeding laid or brought under this subchapter or part VI of subchapter A of chapter 27 and the burden of proof of any such exemption shall be upon the defendant. In the ab-

sence of the production of evidence by the defendant that he has complied with the provisions of section 3231 relating to registration or that he has complied with the provisions of section 2591 relating to order forms, he shall be presumed not to have complied with such provisions of such sections, as the case may be.

STATEMENT

An indictment in two counts was returned against petitioner in the United States District Court for the District of Columbia, each count charging him with being a transferee of marihuana and with having acquired a different quantity of marihuana without having paid the transfer tax required by law (*supra*, pp. 2-5, R. 3-4). Petitioner pleaded not guilty and moved to suppress certain evidence which had been seized by the Government (R. 5-6, 8, 11). At the hearing on this motion, the following testimony was adduced:

Agents of the Treasury Department who had twice seen one Burch Williams pass marihuana cigarettes to an informer at the front entrance to premises located at 1401 New Jersey Avenue, N. W., in the District of Columbia, obtained a warrant for the arrest of Williams (R. 12-13). At 2:00 A. M. on the morning of March 26, 1944, the agents, accompanied by local police officers and a deputy United States marshal, went to the New Jersey Avenue address and knocked on the front door, which is the common entrance to two apartments located there (R. 13, 14-15, 16). The

door was opened by one Gibson.¹ The agents told Gibson they had a warrant, and Gibson then admitted them to an apartment in the house. (R. 13, 16.) One of the agents asked Gibson to identify himself by showing his draft card. Gibson then took a handkerchief from his pocket and threw it toward the sofa in the room. An agent saw something drop and found it to be a marihuana cigarette. He also found a package of 35 marihuana cigarettes behind the sofa. The agent then asked who owned the apartment and was told that petitioner did. (R. 13.) Petitioner, who was sleeping in the next room, was awakened and asked if there was any marihuana in the house (R. 13, 15). When he replied in the negative, the agents asked him if he "minded if they looked the place over for marihuana," and petitioner told them to "go ahead" (R. 13). In the search they found an unused record player which, when forced open, was found to contain 50 marihuana cigarettes. Petitioner produced the key to the cabinet and admitted that the cigarettes were his, but stated that they were for his own use. (R. 14.)

Petitioner was arrested and taken to police headquarters. There he was asked if he was willing to surrender other quantities of marihuana which the agents believed he had at an apartment on Providence Street, N. E. Petitioner replied that he was willing to do so. He accompanied

¹Gibson was separately indicted but tried together with petitioner (R. 10, 11).

the officers to the Providence Street apartment and there turned over to them hat boxes containing marihuana cigarettes, bulk marihuana, and marihuana seeds. (R. 14.)

Petitioner testified that on the night the agents searched his New Jersey Avenue apartment he was unaware of anything unusual until he was awakened by a flash light in his face; that he did not consent to the search of his apartment by the officers, and that the officers in their search upset his furniture and ripped open the mattress on the bed where he had been sleeping. He said that while he was held at police headquarters the agents told him they knew about his wife's apartment on Providence Street and asked him if there was any marihuana there, that they told him they were going to search it whether he agreed or not, and that thereupon he "acquiesced in their demands." (R. 16-17.) He admitted on cross-examination that on the day following his arrest he voluntarily went to the office of the narcotic agents and told them that he had supplied Gibson with marihuana and that he had obtained his supply from "a source in the Middle West" (R. 17).

The court overruled the motion to suppress the evidence secured at both of petitioner's apartments (R. 17), and petitioner was tried before a jury (R. 18). The testimony of the agents and officers before the jury was substantially the same as that given on the motion to suppress (R. 18-25). There was also testimony that demand had

been made upon petitioner by a deputy collector of internal revenue for the production of the order forms required by law for the transfer of marihuana (*supra*, p. 3), and that petitioner had failed to produce such forms (R. 25).

Petitioner was convicted on both counts and sentenced to imprisonment for a period of 16 months to 4 years and to pay a fine of \$500 on the first count, and to a concurrent prison sentence of 16 months to 4 years on the second count (R. 11). On appeal, the court of appeals held that the search of the New Jersey Avenue apartment was illegal in that entrance had been gained by subterfuge, and that petitioner's consent given at a time when the officers were already in the room and had already found evidence of marihuana, was not such a free and voluntary consent as to cure the original illegality (R. 30-32). It accordingly reversed petitioner's conviction on the first count of the indictment, which was based upon the marihuana seized at the New Jersey Avenue apartment (R. 34). The judgment on the second count, based upon the marihuana turned over by petitioner at the Providence Street apartment, was affirmed (R. 34) on the ground that the disclosure of this marihuana was voluntary and that its admissibility was unaffected by the illegality of the first search (R. 32).

ARGUMENT

Petitioner contends (Pet. 3, 8-9) that the illegality of the search of his New Jersey Avenue

apartment and of his arrest on the basis of the evidence thus found, served to render involuntary his consent to turn over the marihuana kept at his Providence Street apartment. There is no merit in this contention. The court of appeals held the initial search invalid primarily because entrance to the apartment was obtained by subterfuge. Petitioner testified that, in the search of the New Jersey Avenue apartment, the agents had upset and damaged his furniture and furnishings (R. 17); the court's holding ■■■ that petitioner's consent to that search was given under compulsion was based on the circumstance that the agents were already in the room and had already found evidence of contraband. No such factors are present in respect of the marihuana kept at the Providence Street apartment. Petitioner agreed to and did accompany the agents to that apartment, unlocked the door, and turned over the boxes containing marihuana. His own testimony that he agreed to do so because the agents told him they knew about the apartment and were going to search it, does not establish lack of voluntary consent. Cf. *DeLapp v. United States*, 53 F. 2d 627 (C. C. A. 8), certiorari denied, 284 U. S. 684.

2. Petitioner's contention that the mere possession of different quantities of marihuana at different places cannot constitute two separate offenses without affirmative proof that the drugs were transferred at different times (Pet. 2, 10-12), and his attack on the validity of the presump-

tion created by the statute (*supra*, pp. 4-5), in so far as it may operate to render him separately liable for possession at two different places (Pet. 12-13), are irrelevant, since, at this time, he stands convicted of only one illegal transfer of marihuana, based upon the quantity of the drug found in his possession at the Providence Street apartment.² The reasonableness of the statutory presumption that possession and failure to produce the necessary forms are *prima facie* evidence of the unlawfulness of the transfer (*supra*, pp. 4-5) is, under the authorities, not open to question. *Casey v. United States*, 276 U. S. 413, 418; *Yee Hem v. United States*, 268 U. S. 178, 185; see also *Rossi v. United States*, 289 U. S. 89, 91.

CONCLUSION

The decision below is correct. The case presents no conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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JULY 1945.

² The United States Attorney's Office informs us that a *nolle prosequi* will be entered as to the first count.

